No. 16,053

United States Court of Appeals

For the Ninth Circuit

JEAN DOBLER,
Appellant,

vs.

OLETA STORY,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

Honorable O. D. Hamlin, Judge.

APPELLEE'S REPLY BRIEF.

LEWIS, SCHER & FERNANDEZ,
P. O. Box 816, Sunnyvale, California,
Attorneys for Appellee.

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STATEMENT OF JURISDICTION.

The plaintiff-appellee adopts the statement of jurisdiction contained in defendant's brief. (App.Op.Br., pp. 1-2.)

NATURE OF THE CONTROVERSY.

This is an appeal by the defendant from a judgment for the plaintiff in an action to recover damages for injuries suffered by the plaintiff in an automobile accident.

The defendant virtually conceded responsibility for the accident (R.T. 94, 102-104) but defended primarily on the ground that her liability was discharged by a release procured by plaintiff's own insurance company. (Exhibit B.) The trial court, sitting without a jury, found that the release was invalid because it was induced by a serious mistake of fact. (Findings of Fact, Paragraph V.)

It will be shown that the existence of such a mistake is sufficient to invalidate the release and that there was substantial evidence supporting the finding of mistake. Consequently, it is submitted that the judgment should be affirmed.

STATEMENT OF THE CASE.

On October 2, 1955, at approximately 9:00 a.m., plaintiff was involved in an automobile accident at the intersection of Highway 101 and Sir Francis Drake Boulevard, normally referred to as the Greenbrae Intersection. At that time plaintiff's vehicle was being driven by her husband and was stopped for a red light at the aforesaid intersection. Plaintiff's vehicle was stopped for approximately 15 seconds when it was struck in the rear by the vehicle being driven by the defendant Jean Dobler. (R.T. 91-95.)

Subsequently, plaintiff entered into a transaction which eventually resulted in the release set forth in appellant's opening brief, pp. 5-6. The only dealings she had concerning this release were with agents of her own insurance company. (R.T. 35-36.) She even-

tually signed the release, but didn't understand it. (R.T. 40.) She did not read the document before signing. (R.T. 40.) She was trusting her own insurance company and believed that these were papers which would allow them to collect their money for having her car fixed. (R.T. 40-41.) In this regard appellee testified as to the negotiations she had prior to the signing of the release and her understanding at the time of its signing. At no time was there any discussion regarding a settlement for her physical trouble, nor a settlement for her medical bills incurred or to be incurred in the future. (R.T. 53.) At no time prior to the signing of the release was she advised that this was a total payment for her entire case. (R.T. 84.) Nor did she believe or know at the time of signing the release that she was to get anything as a consequence of it. (R.T. 86-87.) She believed that she had to sign the papers in order that her insurance company might get their money back. (R.T. 54-55.) And if they got their money back and the appellant's insurance company paid all of the damages on the car, then respondent and her husband would receive their $100.00-deductible back. (R.T. 53.)

At no time during the course of the negotiations relating to the signing of the release did she have the advice of an attorney. (R.T. 47.) Respondent also testified that she had reached only the eighth grade in school. (R.T. 47.)

The amount of the settlement was $330.80; this was the exact amount—to the penny—of the property damage to plaintiff's car. (R.T. 44 and 47.)

After trial of this matter, the court, sitting without a jury, found:

1. That plaintiff was a citizen of California and defendant was a citizen of Texas;
2. That the defendant's vehicle struck the rear end of the vehicle in which plaintiff was riding on the 2nd day of October, 1955, at the intersection of U. S. Highway 101 and Sir Francis Drake Boulevard;
3. The plaintiff suffered general damages in the sum of $2,400.00;
4. That plaintiff incurred medical expenses of $265.00;
5. That the plaintiff at the time of signing the release of all claims did not know or understand that the release covered her claim for personal injuries, but believed that she was releasing only her claim for property damage;
6. That plaintiff was not negligent or careless;
7. That the injuries of plaintiff were not the result of an unavoidable accident or misadventure.

The trial court rendered judgment in favor of plaintiff and concluded that:

1. The court had jurisdiction of the controversy;
2. That the release signed by plaintiff did not bar her recovery;
3. That the plaintiff was entitled to judgment against defendant for $2,400.00 general dam-

ages; $265.00 special damages; and costs of suit.

SUMMARY OF ARGUMENT.

I. The judgment must be affirmed if it is supported by substantial evidence.

II. The judgment is supported by evidence that the release was induced by mistake and was not a valid contract.

A. Plaintiff did not consent to any such release.

B. Proof of a mutual mistake was not necessary.

C. Whether or not defendant induced the mistake is not determinative.

D. Plaintiff was not negligent as a matter of law.

E. A release induced by mistake is not valid.

III. A tender of the consideration was not essential.

IV. The judgment is an equitable one.

V. The parol evidence rule does not apply.

ARGUMENT.

I.

THE JUDGMENT MUST BE AFFIRMED IF IT IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The judgment of the court, sitting without a jury, in this case, was in favor of the plaintiff Oleta Story and against the defendant Jean Dobler. The defend-

ant has appealed the decision of the court and has urged four points on appeal:

1. The release signed by plaintiff was and is a binding and valid contract.
2. Plaintiff did not comply with the provisions of the California Code of Civil Procedure relating to rescission of a contract.
3. To allow plaintiff to avoid the consequences of the contract of release which she voluntarily signed would lead to utter confusion and make a mockery of contract law.
4. The testimony of the plaintiff as to what she was told about the contract and what she understood it to mean was improperly admitted by the trial court.

It is apparently appellant's contention that no matter what the facts may be, as a matter of law this court must find that the plaintiff is barred from recovery because of her having signed the release quoted verbatim on pages 5 and 6 of appellant's opening brief.

Initially, the first question must be, "What law will govern the decision here?" It can be readily seen that this action arose due to the occurrence of an automobile accident on U. S. Highway 101 in the State of California, and that the jurisdiction of the Federal Court attaches because the action is between citizens of different states, 28 U.S.C.A. §1332. Therefore, where Federal jurisdiction depends upon diversity of citizenship, substantive rights are to be adjudged ac-

cording to state or local law. *Erie RR Co. v. Tompkins,* 304 U.S. 64, 82 L. ed. 1188, 58 S.Ct. 817; this court must look to the decisions of the California State Courts in order to make its determination on our particular factual situation.

It is the time-honored rule in California that all substantial conflicts in the evidence must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the findings if possible. *Richter v. Walker,* 36 C2d 634, 640; *Kircher v. Atchison, T. & S.F. Ry. Co.,* 32 C2d 176, 183-185; *Nichols v. Mitchell,* 32 C2d 598, 600-601; *Crawford v. Southern Pac. Co.,* 3 C2d 427, 429.

It is also the rule that a judgment will not be set aside on appeal because of a failure to make an express finding upon an issue if a finding thereon, consistent with the judgment, results by necessary implication from the express findings which are made. *Richter v. Walker,* supra.

And in determining whether a mistake of fact existed, the appellate court must accept as conclusive any decision of the trial court in a factual conflict if there is sufficient evidence to support it. A mere conflict in the testimony as to the mistake does not necessitate a denial of relief. *Reid v. Landon,* 166 A.C.A. 573, 581; *Nelson v. Meadville,* 19 CA2d 68; *Hutchinson v. Ainsworth,* 73 Cal. 452.

If it is appellant's contention that some particular issue of fact is not sustained by the evidence, he is required to set forth in his brief all of the material

evidence on the point and not merely his own evidence. If this is not done, the error is deemed waived. *Tesseyman v. Fisher,* 113 CA2d 404, 407; *Kruckow v. Lesser,* 111 CA2d 189, 200.

In applying these rules, it is obvious that if appellant is relying on insufficiency of the evidence to sustain any material fact found by the trial judge, her assertion of error in this regard must fail since in fashioning her arguments, she has selected from the record only such parts of the evidence favorable to herself by emphasizing the evidence deemed favorable to her side of the case, and discounting or ignoring evidence favorable to respondent's contentions.

The rule of appellate review of evidence previously cited is essentially the same in the Federal Courts. As provided in Rule 52 of the *Federal Rules of Civil Procedure,*

> "... Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses."

And it is the rule that findings of fact are conclusive upon the appellate court unless clearly erroneous. *Blackhawk Hotels Co. v. Bonfoey,* 227 F2d 232, 56 ALR2d 1047, 1053; *National Surety Co. v. Globe Grain & Milling Co.,* 256 Fed. 601, 4 ALR 552, 554.

II.

THE JUDGMENT IS SUPPORTED BY EVIDENCE THAT THE RELEASE WAS INDUCED BY MISTAKE AND WAS NOT A VALID CONTRACT.

A. Plaintiff did not consent to any such release.

The consent of the parties is essential to the existence of a contract. (Cal.Civil Code, §1550.) Consent must be free and an apparent consent is not real or free when obtained through mistake. (Cal.Civil Code, §1565, subd. 1; §1567, subd. 5.)

The gravamen of plaintiff's case is not that the release is a contract which plaintiff assented to in all its terms, but rather it rests on the ground that respondent never consented to enter into any contract releasing all of her claims against defendant; that she was mistaken as to what was meant by the contract; and that this mistake vitiated the entire contract in so far as it related to her physical injuries and made it void *ab initio.* If anything, the release must be construed as a settlement of those matters only as to which the minds of the parties met, and may not be considered to be in satisfaction of anything not consented to by the respondent.

Meyer v. Haas, 126 Cal. 560;
Jordan v. Guerra, 23 C2d 469, 475.

Appellant invokes the rule enunciated in *Greve v. Taft,* 101 Cal. App. 343, 351; and *Palmquist v. Mercer* (1954), 43 C2d 92, 98; yet even these cases recognize that there are exceptions to the general rule cited. Thus, in *Smith v. Occidental,* 99 Cal. 462, 470-471 (cited by the court in *Palmquist v. Mercer,* supra, at p. 98), the California Supreme Court stated:

> "The general rule is that when a person with the capacity of reading and understanding an instrument signs it, he is, in the absence of fraud and imposition, bound by its contents, and is estopped from saying that its provisions are contrary to his intentions or understanding; but it is also the rule that the assent of a party to a contract is necessary in order that it be binding upon him, and that if the circumstances of a transaction are such that he is not estopped from setting up his want of assent he can be relieved from the effect of his signature, if it can be made to appear that he did not in reality assent to it."

And, although generally one is presumed to know the meaning of unambiguous language and will be bound by the execution of a written instrument including it, the rule applies only in the absence of fraud, confidential relationship or circumstances indicating excusable mistake.

Reid v. Landon, 166 A.C.A. 573, at 580;
Fraters G. & P. Co. v. Southwestern C. Co., 107 Cal. App. 1;
Wetzstein v. Thomasson, 34 CA2d 554.

Generally, a mistake of fact occurs when a person understands the facts to be other than they are.

Reid v. Landon, supra, at 580, and cases cited.

As an example of this see the case of *Nelson v. Meadville,* 19 CA2d 68, at 70, wherein the appellate court stated:

> "If the court was satisfied from all the evidence that notwithstanding such examination and reading, the plaintiff did not then understand the terms of the instrument and was not aware that

> they provided for the 25 years' instead of the six months' option, it was authorized to find that the agreements were accepted by plaintiff under a mistake in this particular. (Sullivan v. Moorhead, 99 Cal. 157, 160 (33 P. 796).)"

This the trial court has done in this case and has found to its satisfaction that respondent did not understand the terms of the instrument she signed and that she was suffering under a serious mistake of fact which relieved her from the effects of her signature. (See, Findings of Fact, Paragraph V.)

In summarizing these principles, the court in *Union Pacific Co. v. Zimmer,* 87 CA2d 524, 529, stated:

> "It is well settled, however, that the mere fact that the release is extremely comprehensive in its terms, and purports to be a complete discharge from all claims arising out of the accident, and is understood as such, by the releasor, it will not prevent its avoidance where proper grounds therefor exist." (See cases cited at 529.)

B. Proof of a mutual mistake was not necessary.

It is also eminently clear in this State that it is not necessary that the mistake be mutual, in order to vitiate the effect of a written contract. Indeed, the mistake may be unilateral.

Moore v. Copp, 119 Cal. 429, 436;

Palace Hardware Co. v. Smith, 134 Cal. 381, 384;

National Bank of Calif. v. Miner, 167 Cal. 532, 535;

Forest Lawn v. De Jarnette, 79 Cal. App. 601, 604;

Lepper v. Rattener, 98 Cal. App. 245, 255;
Reid v. Landon, 166 A.C.A. 573.

Appellant makes much of the fact that the mistake was not mutual; yet, it is a permissible inference from the evidence in the record to infer that the defendant herself may have believed the settlement was only for the property damage. The record reveals that appellee had an injury to her neck prior to signing the release (Appellant's Exhibit A; R.T. 32); yet not one penny was paid to appellee by appellant for her physical injuries. The court may very well have been warranted in finding that appellant, too, was laboring under a mistake of fact as to what the settlement was intended to embrace. This inference is buttressed by appellant's failure to introduce evidence by her agents concerning their understanding of the contract of release, and by the failure of appellant to contradict in any way the statements which appellee claimed were made to her by her own insurance agents.

C. Whether or not defendant induced the mistake is not determinative.

Appellant also argues at some length that neither she nor her agents had anything to do with the procuring of the contract of release. Appellee has already pointed out that in California the courts have held that the mistake need not be mutual. In addition, it is not necessary that the mistake of one of the parties be induced and the mistake arise from the fraud of the other party.

Moore v. Copp, supra, at 436;
Palace Hardware v. Smith, supra, at 384.

D. Plaintiff was not negligent as a matter of law.

Appellee takes exception to any contention by appellant that appellee may have been negligent in not more fully informing herself of the contents of the written release. Section 1577 of the California Civil Code reads in part:

> "Mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in:
>
> (1) An unconscious ignorance or forgetfulness of a fact past or present, material to the contract."

In determining what conduct will amount to a neglect of legal duty, the courts recognize that there is an element of carelessness in nearly every case of mistake. (*Van Meter v. Bent Const. Co.,* 46 C2d 588, 595; *Reid v. Landon,* 166 A.C.A. 573, at 579.) As stated by the court in the *Van Meter Case,* at 595,

> ". . . it has been held that ordinary negligence does not constitute the neglect of a legal duty as that term is used in Section 1577 of the Civil Code."

And, in determining whether a mistake of fact existed, the appellate court must accept as conclusive any decision of the trial court in a factual conflict if there is sufficient evidence in the record to support it. (*Reid v. Landon,* supra, at 581.)

Here, the appellee found herself in an unusual position. The release of all claims was procured in this case through the agency of an ostensible friend of the appellee, her insurance agent. She relied in good faith

on what she was told by the agent, and accepted his representations at face value. Whereas in so many cases it is the opposing party who does the negotiating, here it is the trusted confidant who handles the transaction. The rule of wariness which abounds in "arms-length" negotiation is not present in our particular factual situation.

The fact that the appellee signed the release without reading it carefully attests to the lengths to which she was duped. In ruling on a related situation, the Supreme Court of California in *Kane v. Mendenhall,* 5 C2d 749, held that,

> "a person signing without reading in reliance on representations in fact false, may avoid an instrument where a confidential relationship exists between the parties."

The courts recognize that in cases involving a fiduciary relationship,

> "facts which would ordinarily require investigation may not excite suspicion and that the same degree of diligence is not required."
>
> *Hobart v. Hobart Estate Co.,* 26 C2d 412.

See also,

Stevens v. Marco, 147 Cal.App. 451.

Certainly, it must be found as a logical inference from the evidence that as between appellee and her insurance agent a confidential relationship existed. As a general postulate it is stated that, "Confidential and fiduciary relations are, in law, synonymous, and may be said to exist whenever trust and confidence is

reposed by one person in the integrity and fidelity of another." *Estate of Stover,* 188 Cal. 133, 143. It has been held that the relationship of principal and agent is fiduciary. *Kane v. Mendenhall,* 5 C2d 749, at 759.

E. A release induced by mistake is not valid.

In summarizing, it may be said that the California courts have uniformly gone beyond the four corners of the written instrument of release and relieved innocent parties from the effects of their mistake.

The courts have definitely allowed relief where a release or contract has not been read, but has been signed through mistake, inadvertence or the like.

Jordan v. Guerra, 23 C2d 469;
Mairo v. Yellow Cab Co., 208 Cal. 350;
Davis v. Diamond Carriage Co., 146 Cal. 59;
Palace Hardware v. William Smith, 134 Cal. 381;
Meyer v. Haas, 126 Cal. 560;
Smith v. Occidental, 99 Cal. 462;
Olson v. Olson, 148 CA2d 429;
Matthews v. A. T. & S. F. Ry., 54 CA2d 549;
Wetzstein v. Thomasson, 34 CA2d 554;
Touhy v. Owl Drug Co., 6 CA2d 64;
Gajanich v. Gregory, 116 Cal.App. 622;
Raynale v. Yellow Cab Co., 115 Cal.App. 90;
Tyner v. Axt, 113 Cal.App. 408;
Foster v. DeVenney, 107 Cal.App. 500;
King v. Globe Grain Co., 58 Cal.App. 105.

In *Reid v. Landon,* 166 A.C.A. 573, a case similar in many respects to ours, the court held that even though

the contract had been read by the defendant she could avoid the effect of her signature on grounds of mistake.

These cases, as well as several of the cases cited by appellant in Part I of her brief, hold that a contracting party may escape the effects of his signature where fraud, mistake or undue influence exists. If mistake as to the nature of the contract does not exist, then appellee could not recover. However, as a matter of fact, the trier of fact has found it to exist and has ruled on this question in favor of appellee.

III.

A TENDER OF THE CONSIDERATION WAS NOT ESSENTIAL.

Appellee did not have to comply with the provisions of the California Code of Civil Procedure relating to rescission of a contract.

In our case, there was little if any dispute as to the negligence of appellant. The trial transcript reveals the following colloquy between the court and appellant's counsel:

> "The Court. Let's be frank about it. What do you expect to show from this person in Germany? Are you going to take her deposition? Is there any question about whether this was a rear-end collision?
>
> Mr. Bruno. No. Here is the only possibility I see: She says that the light was green when she approached the intersection, she saw these folks coming to a stop and assumed that they would

start right up because the light had just changed. She assumed they would go right on after a moment's hesitation, and they didn't, and that caught her unawares. That is about the extent of her testimony insofar as the factual situation is concerned.

The Court. Let's suppose she testified just to that situation. Would that be a sufficient defense to running into the car in front of you? (102)

Mr. Bruno. No, I wouldn't think so, your Honor. I haven't finished.

That was the one possibility, and I feel it wasn't any excuse, probably." (R.T. 103-104.)

Both the appellee and her husband testified as to the nature of the rear-end accident. Even the appellant admitted that she was at fault for this accident. (R.T. 94.)

An examination of the trial transcript reveals that the only possible defense that appellant has to this case is the release signed by appellee. Without it, the court would have had to find almost as a matter of law that the appellant was negligent. Therefore, it must be apparent that a tender of the consideration received for signing the contract, in this case, $100.00, would be a mere empty act. Appellant would not have accepted such a tender, for without it she was without a defense to the action herein. Under these circumstances, our case must come within one of the exceptions to the requirement of restoration; and that is where the facts are such that it clearly appears that the defendant could not possibly have been injuriously affected by a failure to restore, *Carruth v. Fritch,* 36 C2d 426.

Nevertheless, after a review of the decided authorities in California, it is appellee's position that it is and was not necessary for appellee to tender back the consideration received for the release. The reason for it is that appellee is not attempting to avoid a contract which she has made, but is showing that she did not make the contract which she apparently made. In other words, as far as appellee is concerned, her claim for property damages has been settled to her satisfaction and that is what she believed she settled when she signed the contract of release. At the time of trial she was asserting her claim for physical injuries and medical expenses only. It would be inconsistent to her position in the lawsuit to tender back the consideration received for her settlement of the property damage claim. Cases holding that it is not necessary to offer back the consideration received are:

Jordan v. Guerra, 23 C2d 469, at 476;
Meyer v. Haas, 126 Cal. 560, at 563;
Wetzstein v. Thomasson, 34 CA2d 549;
Tyner v. Axt, 113 Cal.App. 408;
Gajanich v. Gregory, 116 Cal.App. 622.

IV.

THE JUDGMENT IS AN EQUITABLE ONE.

To allow plaintiff and appellee to avoid the consequences of the contract of release would not lead to utter confusion and make a mockery of contract law.

Appellant as part of his argument for Part III of his brief assigns no cases in support thereof. Appellee,

in response thereto, takes the liberty of quoting from a case in many respects similar to ours. In *Denton v. Utley,* 86 NW2d 537 (S.Ct., Michigan, November 26, 1957), in answer to the familiar argument of defendants that the law must favor the strict letter of releases, lest the integrity of all agreements be jeopardized, Justice Smith of the Michigan Supreme Court stated:

> "It should neither surprise nor deceive us that the ancient argument comes before us today in modern garb. Where once the courts were admonished, with respect to the law of trusts, to roil not the conscience lest any gentleman in England be presumed out of his entire estate, to disturb not the letter of the conveyance, lest all security transactions be jeopardized, now we are warned to leave untouched the letter of the release, lest no claim ever be settled, and litigation mount. The argument *in terroram* fails here, as it has always failed and for precisely the same reason: We exist solely to do justice and it shall be done." (At 541.)

Continuing in the same vein, Justice Smith commented:

> "If fraud or mutual mistake has induced the making of an unconscionable contract, the court ought to be more concerned about granting relief than desirous of clinching future wrongs by making such contracts uncontestable." (At 540.)

To summarize Justice Smith's holding on the point urged by the appellant, the following statement may be made:

(1) The overriding principle is that in the accomplishment of its mission, equity will strike down without hesitation any agreement resulting from oppression, fraud, mutual mistake of the contracting parties, or other evil.

(2) The cases rest upon this great principle, not upon the minutiae urged.

(3) It matters not how sweeping are the words involved in the release.

(4) When their content cloaks inequity, they should be vacated and held for naught.

(5) To put it affirmatively, any release to be sustained must be "fairly and knowingly" made.

See, also,

Rickets v. Penn. R.R. Co., 153 F2d 757 (2d Circ., 1946).

"Generally in this class of cases there is frequently the grossest inequality between the negotiating individuals in native intelligence, education and economic bargaining power . . ."

Cf., Patterson, "Equitable Relief for Unilateral Mistakes," 28 Cal. Law Rev. 859, at 893 (1928).

Apparently, appellant is requesting that this court find as a matter of law that when unilateral mistake exists and when a party is mistaken as to what the contract embraces, he is nevertheless bound by the contract he signs; and, in effect, urges that no matter what the inequity or the harshness of the result, a gullible plaintiff who signs a contract of release is

without recourse, and neither court nor jury may change the result; for the four corners of the paper he signs, its twenty-eight lines, contain all of his rights.

This is the holding which appellant advocates. She is asking this court to give lip service to the rule in California that releases and contracts may be set aside in the absence of fraud and undue influence on the ground of mistake of fact. *Backus v. Session,* 17 Cal. 2d 380, 389; *Graham v. A.T. & S.F. Ry. Co.,* 54 CA2d 549, 552.

It is for this court to decide whether it will deprive the trier of fact of the right to determine on the basis of all the evidence whether an injured party will be relieved of his mistake in signing a release. It is for this court to determine in the final analysis whether it will give vitality, growth and unstilted interpretation to the principles enunciated in the cases of *Meyer v. Haas, Smith v. Occidental, Wetzstein v. Thomasson, Jordan v. Guerra* and the cases cited in Part II, or whether it will stereotype all similar cases which are brought on grounds of mistake.

V.

THE PAROL EVIDENCE RULE DOES NOT APPLY.

The testimony of the appellee as to what she was told about the contract and what she understood it to mean was properly admitted by the trial court.

Section 1856 of the California Code of Civil Procedure states:

"When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:

1. Where a mistake or imperfection of the writing is put in issue by the pleadings;

2. Where the validity of the agreement is the fact in dispute.

But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section eighteen hundred and sixty, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties."

It is not necessary for appellee to have affirmatively pleaded mistake in order to put in issue the question of mistake at the time of the trial. Code of Civil Procedure §462; *Gajanich v. Gregory,* supra, at 630; *Wetzstein v. Thomasson,* supra at 556. Thus, §1856 of the California Code of Civil Procedure would authorize the court to examine the circumstances surrounding the execution of the release.

Quoting from the court in *Nelson v. Nelson,* 131 Cal.App. 126, at page 135:

"The competency of oral evidence to ascertain the intention of the parties in executing a written instrument is upheld by the text which is found

> in 6 California Jurisprudence, page 294, §180, in the following language: 'The rule that the intention of the parties is to be ascertained from the writing alone, where a contract is reduced to writing, is subject to other rules of interpretation. A court is not only to take a contract by all its corners, but it is to be placed in the seats of the parties when it was made. In other words a contract is to be construed in the light and with the knowledge of surrounding circumstances. Section 1647 of the Civil Code provides that, "A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates." ' "

In addition, California Civil Code §1640 reads as follows: When through fraud, mistake, or accident a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded. Thus, the question of what is released by a contract of release is open to explanation and elucidation by parol evidence.

See,

Carpenter v. Markham, 172 Cal. 112, 115, and cases cited therein.

And oral evidence to show mistake, fraud, or undue influence may be properly admitted. *Wetzstein v. Thomasson,* supra, at 557.

The Supreme Court of the State of California in *Jordan v. Guerra,* 23 C2d 469, at 477, in quoting from *Kansas City, M. & B. Ry. Co. v. Chiles,* 86 Miss. 361, 38 So. 498, said:

> "No release of this nature should be upheld if any element of fraud, deceit, oppression, or unconscionable advantage is connected with the transaction. And in passing on the validity of such release, when assailed, all surrounding conditions should be fully developed, and the relative attitudes of the contracting parties clearly shown. So that the jury, in the clear light of the whole truth, may rightly decide which story bears the impress of verity."

This exception to the general rule is recognized by the cases cited by appellant. See *Guerin v. Kirst,* 33 C2d 402, 410; *El Zarape v. Plant Food Corp.,* 90 CA 2d 336, 344.

CONCLUSION.

Respondent submits that on the basis of all the facts, the rulings of the relevant cases, and the equities, the judgment of the trial court should be affirmed.

Dated, Sunnyvale, California,
February 16, 1959.

Respectfully submitted,

LEWIS, SCHER & FERNANDEZ,
By WILLIAM J. FERNANDEZ,
Attorneys for Appellee.